PUBLIC PROSECUTOR

v.

DAT ANAK TUNI

HIGH COURT BORNEO, KUCHING
HAIDAR MOHD. NOOR J
[CRIMINAL REVISION NO. KG. 2 OF 1990]
2 OCTOBER 1990

CRIMINAL PROCEDURE: *Order by Sessions Court - Revisionary powers of High Court - Section 325 Criminal Procedure Code.*

CRIMINAL PROCEDURE: *Whether accused of unsound mind and incapable of making defence - Certified fit to stand trial and plead - Sessions Court Judge requested further details - Ordered detention in mental hospital - Whether plea was equivocal - Necessary to make requisite finding - Sections 342, 343, 344 Criminal Procedure Code.*

The accused D was initially charged with an offence under s. 302 of the Penal Code (the Code); at the end of the preliminary inquiry the Magistrate amended the charge to s. 304 of the Code. The Magistrate, suspected D of being of unsound mind and ordered him to be sent to the Sarawak Mental Hospital for one month's observation under s. 342 of the Criminal Procedure Code (CPC). On 3 May 1990, D was charged at the Sessions Court in Kuching; a certificate of the medical superintendent was tendered by the prosecution whereby D was certified fit to stand trial and to plead. However, the learned Sessions Court Judge (SCJ) adjourned the matter requesting further details of the mental status of D.

On 28 May 1990 D was again certified fit to stand trial; however based on what D said when the charge was read to him, the learned SCJ was of the view that D is unable and incapable of making his defence and ordered that he be detained in the mental hospital for safe custody under s. 344 of the CPC pending the order of the Yang di-Pertua Negeri.

The prosecution now asks the Court to exercise its revisionary powers under s. 325 of the CPC in respect of this order; D was unrepresented.

Held:

[1](a) It would appear that the learned SCJ was unduly concerned about the mental state of the accused at the time of the commission of the offence notwithstanding the fact that D had certified fit to plead. The Court held the SCJ was in error - the SCJ's duty is to inquire into the state of mind of D at the time the trial is being held (s. 342 CPC).

(b) "Being of unsound mind" must be distinguished from "being incapable of knowing the nature of the act" under ss. 346 and 347 of CPC.

[2] In the present case, on 28 May 1990, there was no plea at all by D except that he understood the charge and made certain remarks, this is a more compelling reason for the SCJ to proceed with the case for trial.

[3] Even assuming that D was of unsound mind and incapable of making his defence, the SCJ had no jurisdiction to invoke s. 344 of CPC without recording a finding pursuant to ss. 342 and 343 of the CPC that D was of unsound mind and was incapable of making his defence.

[SCJ's order set aside. Case remitted for plea to be taken; if plea equivocal, matter to proceed to trial.]

Cases referred to:
Nabi Ahmad Khan v. R. [1932] AIR Oudh 190
R. v. Driscoll 20 Cr App 161
Lee Weng Tuck & Anor. v. PP [1989] 1 CLJ (Rep) 75

Legislation referred to:
Criminal Procedure Code, ss. 325, 342, 343(i), (ii), 344
Penal Code, ss. 302, 304

Other sources referred to:
Mallal's Criminal Procedure, 4th Edn., p. 511
Sohoni's Code of Criminal Procedure, 17th Edn., Vol. 3, p. 2959

For the public prosecutor - Nik Suhaimi b. Nik Sulaiman, DPP
For the accused - in person

JUDGMENT

Haidar Mohd. Noor J:

The learned DPP wrote to the Court to exercise its revisionary powers under s. 325 of the Criminal Procedure Code ('CPC') in respect of an order made by the learned Sessions Court Judge under s. 344 of the CPC. I called for the record of the proceedings, and on its perusal, decided to hear the parties. Unfortunately the accused was not represented by a Counsel.

The accused, Dat Ak. Tuni was charged at the first instance in the Magistrate's Court at Serian for an offence under s. 302 of the Penal Code. At the end of the preliminary inquiry on 27 February 1990 the learned Magistrate amended the charge to s. 304 of the Penal Code. When the case was mentioned on 2 April 1990 the learned Magistrate suspected that the accused was of unsound mind and then ordered that he be sent to the Sarawak Mental Hospital for observation for one month under s. 342 of the CPC.

On 3 May 1990 the accused was charged before the Sessions Court at Kuching. On that date, a certificate of the Medical Superintendant (P1) was tendered by the prosecution and P1 certified that the accused is fit to stand trial and to plead in Court. However, no plea was taken in spite of P1 and from the notes of the proceedings the learned Sessions Court Judge said:

> However the mental state of the accused at the time of the alleged offence is relevant and in this connection, the Court would require further details of the accused's previous psychiatric illness and his mental state at the time of the incident. The Court therefore requests for further details of the mental status of the accused at the time of the incident ...

She then ordered that the accused be remanded and adjourned the case to 28 May 1990 pending further details from the doctor.

On 28 May 1990, the doctor submitted his report certifying, as in his previous report (P1), that the accused is fit to stand trial. The charge was then read and explained to the accused and this is what the accused said according to the record of the proceedings:

I understand the charge. I did not do it purposely. I do not know why I killed my father.

Whereupon, the learned Sessions Court Judge was of the view that the accused is unable and incapable of making his defence and ordered that he be detained in the mental hospital for safe custody under s. 344 of the CPC pending the order of the Yang di-Pertua Negeri Sarawak.

Section 343(i) of the CPC specifies that if a Medical Superintendent shall certify that the accused is of sound mind and capable of making his defence, the Judge shall proceed with the trial. In this case it would appear that in spite of the first medical report (P1) certifying that the accused is fit to plead, the learned Sessions Court Judge went one step further by saying that "the mental state of the accused at the time of the alleged offence is relevant" and went on further "the Court require further details of the accused's previous psychiatric illness and his mental state at the time of the incident". It would appear therefore that the learned Sessions Court Judge was **unduly concerned about the mental state of the accused at the time of the commission of the offence.** With respect, I think, she is in error here and to this extent *Mallal's Criminal Procedure*, 4th Edn., at p. 511 quoting *Nabi Ahmad Khan v. R.* AIR [1932] Oudh 190 stated:

> The procedure in the case of lunancy at the time of the trial and lunancy at the time of the commission of the offence are entirely separate matters leading to different consequences and these two matters must not be confused together. The first point that a Court has to decide when an accused person is brought before it who is suspected or alleged to be a lunatic, and before the Court can even proceed with the trial for the offence alleged to have been committed, is whether the accused person appears to the Court to be of unsound mind and consequently incapable of making his defence.

Clearly therefore, the learned Sessions Court Judge's duty is to inquire into the state of mind of the accused at the time the trial is being held as provided under s. 342 of the CPC. "Being of unsound mind" must be distinguished from "being incapable of knowing the nature of the act" under ss. 346 and 347 of the CPC (see p. 511 of *Mallal's Criminal Procedure*, 4th Edn. and *R. v. Driscoll* 20 Cr. App. 161). In my view, when the case was first mentioned before her on 3 May 1990 and in the face of P1, she should have the charge read to the accused and for the accused to plead thereto. If, however, she was of the opinion that the accused was not fit to plead in spite of P1 (presumably because of the lapse of time of the issuance of P1 and the trial) she should invoke s. 342 of the CPC and in this case she probably did so, though it is not clear from the record of the proceedings.

When the case was mentioned before her on 28 May 1990, again the Medical Superintendent gave his opinion that the accused is fit to plead and stand trial. The charge was then read and explained to the accused and he understood the charge though he said that he did not do it purposely and he did not know why he killed his father. As the plea appears to be equivocal then in the circumstances, the plea must be treated as one of not guilty and the Court shall proceed to try the case as required by s. 178(iii) of the CPC. In this respect, Mohamad Azmi SCJ, in delivering the grounds of decision of the Supreme Court in the case of *Lee Weng Tuck & Anor. v. Public Prosecutor* [1989] 1 CLJ (Rep) 75 said:

> It is equally settled practice that where the plea of guilty is equivocal, i.e., where it is not clear, or is doubtful or qualified, the plea must in law be treated as one of not guilty and the Court shall proceed to try the case as required by s. 178(iii) of the Criminal Procedure Code.

In the present case, in my view, there was no plea at all by the accused except that he understood the charge and made the remarks stated by me earlier and there is therefore more compelling reason for the learned Sessions Court Judge to proceed with the case for trial. However, even assuming that the accused appeared to be of unsound mind and incapable of making his defence, should the learned Sessions Court Judge invoke s. 344 of the CPC in this case and make the order that she did? In my view, she is again in error here as she has no jurisdiction to order the accused be detained in safe custody under s. 344 of the CPC without recording a finding pursuant to section 343 read with s. 342 of the CPC that the accused is of unsound mind and incapable of making his defence.

Section 343(ii) of the CPC reads:

> If the Medical Superintendent shall certify that such person is of unsound mind and incapable of making his defence the Court shall, if satisfied of the fact, find accordingly, and thereupon the inquiry or trial, as the case may be, shall be postponed.

It would appear, therefore that if the learned Sessions Court Judge is satisfied that the accused may be of unsound mind and incapable of making his defence and find accordingly then only shall she postpone the trial and invoke s. 344 of the CPC and order the accused to be detained in safe custody as may be appropriate otherwise she has no jurisdiction to do so under s. 344 of the CPC (see *Sohoni's Code of Criminal Procedure*, 17th Edn., Vol. 3 at p. 2959).

In the circumstances, the learned Sessions Court Judge erred in making the order under s. 344 of the CPC and in exercise of my revisionary powers, I set it aside. I order that the case be remitted to the Sessions Court for the plea to be taken in view of the report of the medical superintendent and if the plea is equivocal to proceed with the trial. It is only after the Sessions Court has made a finding under s. 343 read with s. 342 of the CPC, can the Sessions Court invoke s. 344 of the CPC.

Also found at [1990] 2 CLJ 1017